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IN THE

Supreme Court of the United States

October Term, 1961

No. 576

WILLIAM WILLIAMS, BARTHOLOMEW CANNIZZARO, LOUIS ANGRISANO, PASQUALE NATARELLI, ROBERT RAINEY, SAMUEL FRANGIMORE, NELSON WILLIAMS, PHILIP DiBLASIS, JOE D. BROWN, RALPH DiBLASIS, STEVEN CANNAROZZO, JOSEPH S. OCCHINO, ERNEST MOULSON, VINCENT J. OCCHINO, MONROE VINSON,

Petitioners,

v.

HON. CARMAN F. BALL, District Attorney of Erie County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BATAVIA TIMES, LAW PRINTERS,
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No.

WILLIAM WILLIAMS, BARTHOLOMEW CANNIZZARO, LOUIS ANGRISANO, PASQUALE NATARELLI, ROBERT RAINEY, SAMUEL FRANGIMORE, NELSON WILLIAMS, PHILIP DiBLASIS, JOE D. BROWN, RALPH DiBLASIS, STEVEN CANNAROZZO, JOSEPH S. OCCHINO, ERNEST MOULSON, VINCENT J. OCCHINO, MONROE VINSON,

Petitioners.

v.

HON. CARMAN F. BALL, District Attorney of Erie County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 31, 1961 (Appendix p. 28, *infra*).

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is set forth in the Appendix hereto at Page 23 and the same has not been officially reported as of this time. A prior opinion of the United States District Court for the Western District of New York is reported at 194 F. Supp. 393 and the same is set forth in the Appendix at Page 29 of the Appendix.

Jurisdiction

The jurisdiction of this Honorable Court is invoked pursuant to 28 U. S. C. 1254 (1), and pursuant to the provisions of Section I (b) of Rule 19, Supreme Court Rules, in that the petitioners have asserted below and assert here, the deprivation of their rights, privileges and immunities secured by the Constitution of the United States, and in that the United States District Court and the United States Court of Appeals have decided an important question of federal law, which apparently has not been, but should be, settled by this Court.

Jurisdiction in the United States District Court for the Western District of New York was invoked pursuant to 28 U. S. C. 1331, 1343 and 42 U. S. C. 1983 and the jurisdiction of the District Court was invoked on the further theory that the action filed therein was one within the purview of the jurisdiction of the said District Court without any requirements as to diversity of citizenship and without any requirement as to amount in controversy in that the matters in controversy therein related solely to the protection of the rights, privileges and immunities of citizens of the United States and, more particularly, the petitioners herein.

Questions Presented

I. Was There Jurisdiction In The District Court To Try The Issues In This Action?

II. Does The Case At Bar Present An Actual Case Or Controversy?

III. Will The Petitioners Suffer Irreparable Harm If The Wire Tap Evidence Is Used?

IV. Has Congress, By The Passage Of Section 605, Title 47, U. S. C. Pre-empted The Field Of Telephonic Communication?

V. In A Case Where State Legislation Conflicts With The Constitution Or Laws Of The United States, Must The State Legislation Give Way To The Federal?

VI. Should The District Court Have Convened A Three-Judge Court?

VII. In The Event That This Court Decides That The Present Action Is Not One For A Three-Judge Court, Should The District Court, Acting By A Single Judge, Nevertheless Assume Jurisdiction?

Constitutional Provisions Involved

This case involves the Fourth and Fifth Amendments of the United States Constitution as well as Section I of the Fourteenth Amendment to the Constitution of the United States. In addition, reference is necessarily made to Article VI, Paragraph 2 of the United States Constitution.

Statement of the Case

An action was commenced in the United States District Court for the Western District of New York for a declara-

tory judgment to the effect that Title II-A, Section 813-a of the Code of Criminal Procedure of the State of New York and Article I, Section 12, Paragraph 2 of the New York State Constitution are unconstitutional as repugnant to the Constitution and Laws of the United States, particularly, the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. The action also sought an interlocutory injunction and simultaneously an application was made in the District Court to convene a three-judge Court in order to determine the unconstitutionality of the statutory and constitutional provisions hereinabove quoted. The application to the District Court also sought a temporary stay of the criminal trial then, and, now pending in the Erie County Court pending the determination of the action filed in the District Court.

By decisions and orders of the District Court, the applications were denied and the action was subsequently dismissed on motion of the respondents. Thereafter an appeal was taken from said orders of the District Court to the United States Court of Appeals for the Second Circuit and on the 31st day of August, 1961, the Court of Appeals affirmed the orders of the District Court.

During the course of the litigation in the District Court and on the 11th day of August, 1961, an order was entered in the said District Court for the Western District of New York discontinuing the action as to the defendants therein, Hon. Arthur J. Cornelius, Jr., Superintendent, New York State Police; Hon. Louis J. Lefkowitz, Attorney General, State of New York, and the Commission of Investigation of the State of New York so that the only remaining defendant therein is the respondent set forth in this petition.

Reasons for Granting the Writ

This case presents important federal constitutional issues involving the right of private citizens to be secure in their right of privacy as guaranteed to them by the Fourth Amendment to the Constitution as well as the Fourteenth Amendment, Section I of the United States Constitution as applied to the states and it further involves a serious conflict between state legislation authorizing wire tapping as opposed to federal legislation which completely prohibits the same type of conduct.

I.

Was there jurisdiction in the District Court to try the issues in this action?

Title 28 U. S. C. 1337 provides that, "the District courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce • • •" The Communications Act of 1934 is "An act of Congress regulating commerce." *Benanti v. United States*, 355 U. S. 96, 104-05 (1957); *cf. Mulford v. Smith*, 307 U. S. 38, 46 (1939). Since the asserted right to relief is based upon Section 605 of the Communications Act, a suit to protect the federal right against impairment by state officers is a suit "arising under" the federal statute. *A. F. of L. v. Watson*, 327 U. S. 582, 590-91 (1946).

Jurisdiction also lies under 28 U. S. C. 1343 (3) which provides in part: "The District Court shall have original jurisdiction of any civil action authorized by law to be commenced by any person • • • (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the

United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States • • •"

The Fourteenth Amendment of the United States Constitution, Section I thereof, provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is submitted that the privileges and immunities of the petitioners have been, and are being abridged, by the operation and enforcement of Section 813-a of the New York State Code of Criminal Procedure as well as Article I, Section 12, Paragraph 2 of the New York State Constitution.

A further basis for founding jurisdiction in the District Court is 42 U. S. C. 1983 which provides, "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

28 U. S. C. 2201 provides, "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and

other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U. S. C. 2281, 2283 and 2284 provide for the convening of a three-judge Court, the granting of interlocutory injunctions, and, the procedures relating thereto.

Thus, there were ample bases for the District Court to assert primary jurisdiction over this cause of action in equity.

II.

Does the case at bar present an actual case or controversy?

In all the proceedings heretofore had in the District Court, the respondent, District Attorney of Erie County, never denied that wire taps had been obtained to tap the phones of the petitioners herein; nor did he deny that the information obtained thereby would be used in the pending criminal trial in the County Court, Erie County, State of New York. The claim is asserted that state officers had proceeded lawfully by virtue of Section 813-a of the Code of Criminal Procedure of the State of New York and by Article I, Section 12, Paragraph 2 of the Constitution of the State of New York.

However, the petitioners assert that irrespective of these provisions, wire tapping is completely prohibited by Section 605 of the Communications Act.

The direct issue, *viz.*, the validity of the state legislation, has never been decided by any Federal Court. The con-

stitutional issues have been discreetly avoided by the Supreme Court in two cases thus far, in *Schwartz v. Texas*, 344 U. S. 199, 97 L. ed. 321, 73 S. Ct. 232, decided in 1952 and *Pugach v. Dollinger*, D. A. Bronx County, ___ U. S. ___, 5 L. ed. 2d 678, decided in February, 1961. Both of these cases were decided on different grounds neither of which turned on the constitutionality of the New York provisions. *Schwartz, supra,* merely held that a state rule of evidence should not be overturned by the Supreme Court even though the Court was satisfied that the action of the state officials nonetheless violated Section 605. No state legislation was there involved nor was any injunction sought. The case was decided on certiorari to the Court of Appeals of Texas after an affirmance of a conviction in the state trial wherein wire tap evidence was admitted.

Pugach, supra, on the other hand, involved an equity proceeding brought in a Federal Court seeking a permanent injunction to restrain the use of wire tap evidence in a pending New York State criminal trial. Although the constitutionality of the New York provisions was alluded to by the parties to the action, it is apparent from the *per curiam* opinion of this Court that no constitutional question was decided in view of the *Schwartz* decision. This is in line with the longstanding policy of this Court to avoid deciding constitutional questions where such a decision can rest on other non-constitutional grounds.

The only other attempt to test the constitutionality of the New York statute and constitution in this regard was in *Hoffman v. O'Brien*, 88 F. Supp. 490; aff'd, 339 U. S. 955 and decided in 1949 in the United States District Court for the Southern District of New York. In this case, the plaintiff was the President of the New York County Criminal Courts Bar Association and the defendants were

the Police Commissioner of New York City, the District Attorney of New York County and the Attorney General of the State of New York. There the plaintiff sought a judgment declaring invalid and in violation of Section 605 of the Communications Act, the statutory and constitutional provisions of New York relating to wire tapping. Motions to dismiss the complaint were granted by the District Court. One of the grounds for dismissal was that the complaint failed to allege facts with sufficient definiteness to show that the plaintiffs had been deprived of any rights, privileges or immunities secured by the Constitution and the laws of the United States and in such failure there was not alleged an actual or justiciable controversy.

The Court further held, "The complaint here does not permit the exercise of discretion, for without a clear and unequivocal allegation that the plaintiffs' civil rights are being invaded by a Court order obtained under the provisions challenged, plaintiffs have no standing to maintain this action * * *"

The complaint, more particularly, contained no allegation that plaintiffs' telephone had been, in the past, or were, then, the subject of any order allowing interceptions and divulgences of conversations carried on over them. There was no allegation that any action was either threatened or impending.

It is apparent then that the omissions in *Hoffman, supra*, are amply supplied in the case at bar by the respondent's affidavits and answer in all the proceedings thus far as well as in oral argument by the respondent in the District Court. See also *McGuire et al. v. Amrein, et al.*, U. S. D. C., Md., 1951, 101 F. Supp. 414, which was another wire tap case decided in the District Court of Maryland in 1951.

However, this case involved an action for a permanent injunction and arose prior to the passage by Maryland of any legislation authorizing eavesdropping so that again there was no case or controversy arising from the conflict between state and federal legislation as there is in the case at bar. However, although there was no problem of wire taps but rather one of an unreasonable search and seizure in *Wolf v. Colorado*, 388 U. S. 25, 93 L. ed. 1782, 69 S. Ct. 1359, it is interesting to note the position of this Court on the question of affirmative state action. In this case the search was conducted by state officers and the evidence obtained thereby was used in a State Court proceeding. The Court held that in a prosecution in a State Court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. However, although the Court's holding was thus narrowly confined, in the course of the opinion it was said; "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourteenth Amendment—is basic to a free society. It is, therefore, implicit in the concept of ordered liberty and as such enforceable against the states through the Due Process Clause • • • Accordingly, we have no hesitation in saying that were a state *affirmatively to sanction such police incursion into privacy* it would run counter to the guaranty of the Fourteenth Amendment." (Emphasis supplied.) But see, *Mapp v. Ohio*, ___ U. S. ___, 6 L. ed. 2d 1081 (1961).

Can there be any more of an affirmative sanction of police incursion into privacy than that which is contained in New York's wire tap legislation? Consequently, and in accordance with *Wolf v. Colorado, supra*, the District Court should have granted the petitioners the relief sought therein.

III.

Will the petitioners suffer irreparable harm if the wire tap evidence is used?

It is conceded that the imminence of prosecution even alleged to be in violation of constitutional guarantees is not a ground for equity relief since the lawfulness or constitutionality of the statute or constitutional provision on which the prosecution is based may, generally speaking, be determined as readily in the criminal case in the state proceeding as in a suit for injunctive relief. *Douglas v. Jeannette*, 319 U. S. 157. However, there can conceivably be cases where the constitutionality of a statute could be raised in a criminal trial but because of some countervailing rule of evidence, the constitutional issue could, and probably would be avoided since the decision could be grounded on some non-constitutional point.

For example, the State of Texas allows the use of illegally obtained evidence. *Schwartz v. Texas, supra.* This is the common-law rule and is strictly adhered to by New York. See *People v. Defore*, 242 N. Y. 13, on the question of illegally obtained evidence; *People v. Variano*, 5 N. Y. 2d 391; *People v. Dinan*, 6 N. Y. 2d 715. In both *Defore, supra*, and *Dinan, supra*, certiorari was denied by the Supreme Court. It may be argued that since *Mapp v. Ohio, supra*, decided on June 19, 1961, the rule as to the admissibilty of allegally obtained evidence has now been overturned by the recent Supreme Court pronouncement. However, it should be borne in mind that Mapp, *supra*, only applies to the inadmissibility of evidence obtained as the result of an unreasonable search and seizure by state officers and in a state criminal proceeding. Since the case at bar concerns the use of wire tap evidence and not evidence obtained as

the result of an unreasonable search and seizure, it is questionable whether *Mapp, supra*, reaches the case at bar and, therefore, in the event of convictions at the trial level of the petitioners herein and in the event of appeals being taken to the New York Court of Appeals, it is questionable whether the New York Court of Appeals would apply the rule of *Mapp v. Ohio, supra*, since the case at bar would not involve an unreasonable search and seizure.

The conclusion is, therefore, inescapable that in the present case, if the petitioners are prosecuted and convicted by the use of wire tap evidence, no further appeal beyond the New York Court of Appeals would be possible, even though Section 813-a and Article I, Section 12, Paragraph 2 were attacked because of unconstitutionality. It is quite obvious that both the New York Court of Appeals and the Supreme Court would simply take the position that since evidence illegally obtained is, nevertheless, admissible, a conviction would be affirmed and there would be no basis for certiorari in this Court. Consequently the petitioners could not vindicate their rights in the event of a conviction thereby suffering irreparable harm in every respect possible. This then, distinguishes the situation from the rule enunciated in *Douglas v. Jeannette, supra*.

One must not lose sight of the fact also that the New York Court of Appeals has already ruled on the constitutionality of the eavesdropping provisions in *Harlem Check Cashing Corporation v. Bell, Superintendent of Banks*, 296 N. Y. 15. There the Court stated, "The State of New York having provided, by constitution and statute, certain specific methods by which it may exercise its fundamental power of gathering evidence of criminality and of prosecuting crime, it surely is not to be assumed that Congress intended to circumscribe that power unless it unequivocally indicated

such an intent. A federal statute, it is recognized, must be presumed to be limited in effect to the federal jurisdiction and not to supersede a state's exercise of its police power unless there be a clear manifestation to the contrary * * * ".

IV.

Has Congress, by the passage of Section 605, Title 47, U. S. C. pre-empted the field of telephonic communication?

A strong indication that Congress by the passage of Section 605 has pre-empted the field of telephonic communications is implicit in *Benanti v. United States, supra*, and decided in December, 1957. In that case, wire tap information was obtained by state officers in New York. Subsequently, petitioner was tried in the United States District Court for the Southern District of New York for illegal possession and transportation of distilled spirits lacking the required Federal tax stamps. Petitioner was convicted and the conviction was affirmed by the Court of Appeals for the Second Circuit, 244 F. 2d 389.

In an opinion by Chief Justice Warren, the judgment of conviction was unanimously reversed.

In the course of the opinion, the Court stated, "Respondent does not urge that, constitutionally speaking, Congress is without power to forbid such wire tapping even in the face of a conflicting state law. *Cf. Weiss v. United States*, 308 U. S. 321, 327. The argument is that Congress has not exercised this power and that Section 605 being general in its terms should not be deemed to operate to prevent a state from authorizing wire tapping in the exercise of its legitimate police functions. However, we read

the Federal Communications Act and Section 605 in particular to the contrary.

"The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. *Weiss v. United States, supra.* The natural result of respondents' argument is that both interstate and intrastate communications would be removed from the statute's protection because as this Court noted in *Weiss, supra*, the interceptor cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in Section 605 in such a vulnerable position. Respondent points to portions of the act which place some limited authority in the states over the field of interstate communication. The character of these matters, dealing with aspects of the regulation of utility service to the public, is technical in nature in contrast to the broader policy considerations motivating Section 605. Moreover, these grants of authority to the states underscores the conclusion that had Congress intended to allow the states to make exceptions to Section 605, it would have said so. In light of the above considerations and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy. *Cf. Pennsylvania v. Nelson*, 350 U. S. 497; *Hill v. Florida*, 325 U. S. 538; *Hines v. Davidowitz*, 312 U. S. 52 * * *".

It is interesting to note that several attorneys general of the United States have urged Congress to grant exceptions

to Section 605 to Federal Agents under limited circumstances. See Hearings before Subcommittee No. 5 of the House Committee on the Judiciary in H. R. 762, 867, 4513, 4728, 5096, 84th Cong. 1st Sess. 28; Rogers, The Case For Wire Tapping, 63 Yale L. J. 792 (1954). But Congress has declined to do so. In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to State Agents with no further legislation on its part.

On the question of pre-emption it is worthy of note that after discussing the question, the Court cited *Pennsylvania v. Nelson, supra, Hill v. Florida, supra,* and *Hines v. Davidowitz, supra,* all cases involving the question of pre-emption. These citations set out by the Court in *Benanti, supra,* would seem to strongly suggest the idea that this Court is hinting at the fact that Congress has so pervaded the field of telephonic communications that it has pre-empted it.

Apparently, the Chief Justice of this Court, at least, indicates that Congress set out such a comprehensive scheme in this field so as to preclude any other conclusion on the subject.

V.

In a case where state legislation conflicts with the constitution or laws of the United States, must the state legislation give way to the federal?

Article VI, Paragraph 2 of the United States Constitution states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the

land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding * * *"

A state statute is in conflict with a federal statute when one may incur the penalty of the federal statute by obeying the state statute or vice-versa. State laws must yield to federal laws passed within the sphere of delegated powers but a state law is superseded by federal law only to such extent as the two are inconsistent, *Hill v. Florida, supra;* and where the question is the reach of a federal statute when in conflict with state law, a federal Court should assert and not forego its jurisdiction. *United Airlines v. Public Utilities Comm. of Cal.*, D. C. Cal. 1952, 109 F. Supp. 13 reversed on other grounds, 346 U. S. 402. See, also, *Pennsylvania v. Nelson, supra,* and *Hines v. Davidowitz, supra.*

Hill v. Florida, supra, involved a statute passed by the Florida legislature providing for the licensing of any person seeking to act as the business agent of a union. There were also penal sanctions contained in the legislation for acting as a business agent without obtaining the license. The Supreme Court struck down the legislation as being repugnant to the Wagner Act which provided for unrestricted collective bargaining. The Supreme Court held also that the Florida legislation restricted that which the Wagner Act freely allowed.

Hines v. Davidowitz, supra, involved the conflict between state alien registration legislation and federal legislation on the same subject and in *Pennsylvania v. Nelson, supra,* certain legislation respecting sedition was struck down as being in derogation of the Smith Act. Here, again, the Supreme Court held that where Congress had pervaded the

field of security, there would be no room for state legislation within the same sphere of influence.

It is submitted that Congress intended the same result in passing the Communications Act of 1934 so that any state legislation conflicting with the act would necessarily have to be subordinated to the federal act. Consequently, 813-a of the Code of Criminal Procedure of the State of New York and Article I, Section 12, Paragraph 2 of the New York State Constitution respectively cannot validly be upheld so long as Section 605 of the Communications Act remains in its present form.

VI.

Should the District Court have convened a three-judge Court?

One of the prerequisites of the applicability of 28 U. S. C. 2281 is a request for injunctive relief against the enforcement of a state statute or constitution. This follows from the text of Section 2281. *Teeral Co. v. New York* (1950 D. C. N. Y.), 88 F. Supp. 652. The complaint herein seeks an interlocutory injunction as well as a declaration as to the unconstitutionality of the New York legislation. Certainly if a properly constituted Court were to declare the state statute and constitution unconstitutional, no New York Court could thereafter allow the legislation to be enforced or used by any state officer. Indeed, within the past year, New York judges have very adequately reflected the confusion existing between the New York legislation and the federal legislation whereby some of the judges have allowed the use of wire tap evidence in criminal trials whereas others have steadfastly refused either to sign *ex parte* orders for

eavesdropping or have refused to allow the use of wire tap evidence in any trials over which they have presided.

Next, the action must be directed against the state statute as the term is used in 28 U. S. C. 2281. The term comprehends provisions of the state constitution as well as all state legislation provided they are of state-wide application. This element is satisfied by the pleadings filed in the District Court, it is submitted.

The action must be directed against an "officer of such state" as the terms are used in Section 2281, that is, against an officer who is enforcing state laws of a state-wide concern, and not against one who, although acting under such a law, does so as a local official and on behalf of a locality. *Teeval Co. v. New York, supra.*

Moreover, the action must be directed against a statute or constitutional provision of the state.

Irrespective of the existence of all other prerequisites, the complaint must still set forth a cause of action upon which a Federal District Court can grant relief. It is submitted that the present case is one in which the District Court could have granted relief.

Douglas v. Jeannette, supra, appears to set up the standards upon which the Supreme Court has consistently relied in determining whether a three-judge Court should be convened. The action involved a suit to enjoin prosecuting officials in the Village of Jeannette from prosecuting Jehovah witnesses for certain violations of an ordinance. Some prosecutions were already pending and some prosecutions were threatened.

The lower Court was held to have jurisdiction to hear and decide the question of the constitutional validity of

the ordinance. By operation of the Fourteenth Amendment, the Supreme Court held there was alleged an abridgement of rights guaranteed by the constitution and that, therefore, the bill set out a case or controversy which was within the adjudicatory power of the District Court.

Notwithstanding the authority of the Court, however, it was held there must still be established a cause of action in equity and even where there is a cause of action in equity, the Court may, nevertheless, object to hearing the matter on its own motion. Especially should it do so, it was held, where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a State Court.

There is no doubt that courts of equity in the exercise of their discretionary powers should conform to the policy of non-interference with threatened proceedings in State Courts *save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent;* and equitable remedies infringing this independence of the states should be withheld if sought on slight or inconsequential grounds (Emphasis supplied).

The Court held further that it did not appear from the record that the petitioners had been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith or that a Federal court of equity by withdrawing the determination of guilt from the State Courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to the Supreme Court.

In the last respect, it has already been indicated herein that to raise the constitutional question in the pending criminal trial would be futile in view of the *Schwartz*

decision, *supra*, since certiorari would be denied in the event of a conviction and affirmance by the New York Court of Appeals of the petitioners herein since the Court would base its denial of certiorari on the New York rule of evidence on illegally obtained evidence.

Now does *Douglas v. Jeannette, supra*, stand for the proposition that courts of equity should never intervene in state criminal proceedings because, how, in the case at bar, could a person prosecuted ever be able to vindicate his rights in the event of a conviction? What the respondent, District Attorney, is here saying is that a defendant in the pr[illegible]ent circumstances should try his luck in the pending criminal trial and if he is unsuccessful, then he should be led up to an appellate dead-end, and, if still unsuccessful, he, the defendant has at least had his day in court irrespective of any constitutional infringement of his basic rights. This, the law has never contemplated. If it had, our constitution would become a worthless document not worth the paper on which it was written.

With the substantiality of the federal question involved in this case, it stands as one of the exceptional cases in which a court of equity should intervene in order to do substantial justice to the litigants.

It also should be remembered that petitioners seeking to restrain the operation and enforcement of the state statute or constitution on the ground of constitutional infirmities should not be shunted easily away from a three-judge statutory court. *Lineham v. Waterfront Commission of New York Harbor*, D. C. N. Y., 1953, 116 F. Supp. 401.

VII.

In the event that this Court decides that the present action is not one for a three-judge Court, should the District Court, acting by a single judge, nevertheless assume jurisdiction?

It is conceded that a three-judge Court should be convened only where a state statute or constitutional provision violates some provision of the United States Constitution. It is also generally agreed that where the sole attack on a state statute or constitutional provision is based upon the conflict with some Federal Statute, then a single judge can exercise jurisdiction in an action for a declaratory judgment, declaring the state statute or constitutional provision unconstitutional.

In the case at bar, if this Court affirms the decision of the United States Court of Appeals for the Second Circuit to the effect that there are no constitutional issues before the Court to warrant the impaneling of a three-judge Court, then it must still contend with the argument put forth by the petitioners based upon the obvious conflict between the New York legislation on wire tapping and Section 605 of the Communications Act giving full effect to the supremacy clause of the United States Constitution. The Court would have to assume jurisdiction, by a single judge, admittedly, to declare the unconstitutionality of the New York legislation. In this respect see *U. S. vs. Warne*, 190 F. Supp. 645 (1960); *Public Utilities Com. v. U. S.*, 355 U. S. 534; *Ervers v. Dwyer*, 358 U. S. 202; *Felter v. Southern Pacific Co.*, 359 U. S. 326. These cases indicate that where there is state legislation which conflicts with some federal enactment, there is, therefore, presented an actual controversy in which a Federal court should exercise jurisdiction in an

action to declare the state statute unconstitutional. If the argument is only based upon the Supremacy Clause, then the Court should act by a single judge, nevertheless. If, on the other hand, there is a constitutional issue involved, then there would have to be a three-judge Court impaneled. It is submitted that the issues involved herein are constitutional issues to be decided. However, petitioners are not unmindful of the position on the constitutional issue which this Court has taken in *Olmstead v. United States*, 277 U. S. 438 (1928). Nonetheless, it is the position of the petitioners in this proceeding to request this Court to re-assess the position taken by the Supreme Court in *Olmstead, supra*, in view of the prevailing conditions today existing in the State of New York as well as in other states wherein wire tap legislation has been enacted or where the use of illegally obtained evidence by way of wire tapping has been allowed in state criminal trials.

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should issue.

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PETER L. PARRINO, ESQ., *of Counsel*,

Attorneys for Petitioners.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 430—October Term, 1960.

(Argued August 29, 1961 Decided August 31, 1961.)

Docket No. 27115

WILLIAM WILLIAMS, *et al.*,
Plaintiffs-Appellants,

v.

HON. CARMAN F. BALL, District Attorney
of Erie County,
Defendant-Respondent.

Before: Lumbard, Chief Judge, Moore and Friendly, Circuit Judges.

Plaintiffs, in an action seeking a declaration of the unconstitutionality of Art. I, § 12, paragraph 2, of the Constitution of New York and of § 813-a of the New York Code of Criminal Procedure, authorizing wire-tapping, and a temporary injunction against a state court prosecution in which wire-tap evidence was to be used, appeal from orders of the District Court for the Western District of New York, John O. Henderson, Judge, declining to convene a court of three judges, denying the injunction, and dismissing the complaint. Affirmed.

FRIENDLY, Circuit Judge:

The amended complaint in this action, brought in the District Court for the Western District of New York

against the District Attorney of Erie County and other state officers in March, 1961, alleged that between January and October, 1959, state officers had obtained orders, under § 813-a of the New York Code of Criminal Procedure and Art. I, § 12, paragraph 2, of the New York Constitution,[1] authorizing the interception of plaintiffs' telephone conversations; that, pursuant to such orders, wire-taps were placed and tape recordings of telephone conversations made; that defendants had divulged to the grand jury of Erie County the contents of conversations so intercepted; and that defendants intended to employ the wire-tapped conversations and information obtained therefrom in the trial of an indictment returned against the plaintiffs by the grand jury. Plaintiffs sought a declaration that § 813-a and Art. I, § 12, paragraph 2, were unconstitutional and an injunction of the state criminal trial *pendente lite*. The answer admitted the interceptions, and the intention to use evidence obtained therefrom at the trial. Plaintiffs moved that the District Judge convene a court of three judges pursuant to 28 U. S. C. § 2281 to consider their complaint and that he enjoin the trial in the meanwhile; Judge Henderson denied the motions. Plaintiffs appealed and moved the District Court for a stay of the trial pending the appeal; this was denied. Later the action was discontinued by stipulation against all the defendants save the District Attorney, who moved for dismissal. His motion was granted, and appeal has been taken therefrom. Appellants having moved this Court for a stay of the trial, now scheduled for September 5, pending appeal, we suggested that the appeals themselves be heard forthwith and the parties have briefed and argued the cases accordingly.

[1] These are set out in *Pugach v. Dollinger*, 277 F. 2d 739, 742, fn 3 (2 Cir. 1960).

We now affirm the orders, thereby rendering the motion for a stay moot.

28 U. S. C. § 2281 requires a court of three judges in the case of "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute * * * upon the ground of the unconstitutionality of such statute." The District Judge was right in declining to convene such a court, on two independent grounds. No injunction "restraining the enforcement, operation or execution" of a statute was sought; the interceptions that had been authorized under the New York Constitution and statute were not claimed to be continuing, and the New York legislation says nothing as to the use of evidence obtained from interceptions authorized thereby. Moreover, the claim that the legislation contravenes the Fourth or Fifth Amendment to the Federal Constitution was insubstantial in the light of *Olmstead v. United States*, 277 U. S. 438 (1928), which the Supreme Court has shown no disposition to overrule, *Goldman v. United States*, 316 U. S. 129, 135-136 (1942); *Silverman v. United States*, 365 U. S. 505 (1961); and Supreme Court decisions, which we recently reviewed in *Bell v. Waterfront Commission*, 279 F. 2d 853, 858-859 (2 Cir. 1960), make it plain that, whatever might have been thought, a claim of conflict between a state statute and an overriding Federal statute, here § 605 of the Federal Communications Act, 47 U. S. C. § 605, is not a claim of "unconstitutionality" within § 2281.

The Court was also right in refusing to entertain plaintiffs' request for a judgment, under 28 U. S. C. § 2201, declaring the New York legislation invalid. Even if the Court

were to determine that issue in plaintiffs' favor,[2] such a decision would not avail them. The wire-tap evidence would still be receivable in the state trial so long as the Supreme Court adheres to the clear holding of *Schwartz v. Texas*, 344 U. S. 199, 203 (1952), "that § 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings." We do not read *Mapp v. Ohio*, 367 U. S. 643 (1961), as overruling *sub silentio Schwartz v. Texas*—on which six Justices had expressly relied, only four months earlier, in the *per curiam* affirmance, 365 U. S. 458 (1961), of our decision in *Pugach v. Dollinger*, 277 F. 2d 739 (2 Cir. 1960).[3] Under these circumstances the teaching of *Coffman v. Breeze Corporations, Inc.*, 323 U. S. 316 (1945), and *Public Service Comm. v. Wycoff Company, Inc.*, 344 U. S. 237 (1952), cautioning against the use of the declaratory judgment primarily to assist a litigant in a different proceeding, applies *a fortiori*.

There are some intimations in plaintiffs' brief that, quite apart from their request for a declaratory judgment, *Pugach v. Dollinger, supra*, must be reconsidered in the light of *Mapp v. Ohio, supra*. We find no basis in *Mapp* for extending its application to a state's receiving evidence the divulgence of which would violate a Federal statute. What was there banned was a state's receipt of evidence obtained "by way of unconstitutional seizure of goods, pa-

[2] Such a determination might well require resolution of the question, reserved by the Supreme Court in *Benanti v. United States*, 355 U. S. 96, 100, fn. 5 (1957), whether both an interception and a divulgence "are necessary for a violation of § 605."

[3] If it did, there would be no need for a declaratory judgment, since plaintiffs would be free to assert their rights in the state court and ultimately by certiorari from the Supreme Court.

pers, effects, documents, etc.," 367 U. S. at 656, prohibited by the Fourth Amendment as made applicable to the states by the Fourteenth. None of the opinions in *Mapp* questions the statement in *Schwartz v. Texas*, *supra*, at 202-203, "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so" or the conclusion in *Schwartz* that § 605 did not manifest such an intention in the field of evidence. It is unfortunate that Congress has not acted on the many proposals that have been made to deal with the wire-tapping problem; meanwhile we shall adhere to the decision in *Pugach* unless a higher authority should now will it otherwise.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of August one thousand nine hundred and sixty-one.

Present: Hon. J. Edward Lumbard,
Chief Judge.

Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Circuit Judges.

WILLIAM WILLIAMS, BARTHOLOMEW CANIZZARO, LOUIS ANGRISANO, PASQUALE NATARELLI, ROBERT RAINEY, SAMUEL FRANGIMORE, NELSON WILLIAMS, PHILIP DiBLASIS, JOE D. BROWN, RALPH DiBLASIS, STEVEN CANNAROZZO, JOSEPH S. OCCHINO, ERNEST MOULSON, VINCENT J. OCCHINO, MONROE VINSON,
Plaintiffs-Appellants,

v.

HON. CARMAN F. BALL, District Attorney of Erie County,
Defendants-Respondents.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILLIAM WILLIAMS, *et al.*,
Plaintiffs.

vs.

HON. CARMAN F. BALL, District Attorney of Erie County, *et al.*,
Defendants.

Civil 9081.

By decision dated June 7, 1961, this court denied plaintiffs' motions for the convening of a statutory court of three judges and for a temporary stay of a criminal trial now pending in the Erie County Court until the final determination of this declaratory judgment action. No motion to dismiss the action was made by defendants, and the decision was accordingly limited to the issues then presented.

Appendix C

Defendant Carman F. Ball has now moved for dismissal of the entire action on the ground that the complaint fails to state a claim upon which relief could be granted and further moves for judgment on the pleadings.

Plaintiffs' complaint will be dismissed for the reasons stated in *Shell Oil Company v. Frusetta*, 290 F. 2d 689 (9th Cir. 1961), which is felt to be particularly appropriate here. Plaintiffs are attempting to obtain a declaratory judgment in this action which will, in effect, amount to an advisory opinion to be used in a state criminal trial which is now pending. The declaratory judgment action is not designed to permit legal questions arising in the course of state litigation to be removed to the federal forum. Although the complaint asks for judgment that the New York statute permitting wiretapping is unconstitutional, this judgment can only be of value to plaintiffs in the course of their state trial. Wiretaps have been completed and presumably removed. There is nothing in the record to indicate that the state is now tapping plaintiffs' wires or intends to do so. The issue whether the prior taps were legal or illegal under federal law—to the extent that that issue affects the admission of wiretap evidence in the state trial—can be decided just as readily in the state court as here. Motion to dismiss is granted.

So ordered.

Dated: Aug. 22, 1961.

s/s JOHN O. HENDERSON,
JOHN O. HENDERSON,
United States District Judge.

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILLIAM WILLIAMS, *et al.*,
Plaintiffs.

vs.

HON. CARMAN F. BALL, District Attorney of Erie County, *et al.*,
Defendants.

Civil 9081.

Plaintiffs, presently under indictment on state gambling charges, contend that wiretap evidence was presented to the Grand Jury and will be used on the trial of their case.[1] They have brought this action to obtain a declaratory judgment that section 813(a) of the Code of Criminal Procedure and Article 1, Section 12 of the New York State Constiution, which authorize wiretapping pursuant to court order, are invalid. They have moved for the convening of a statutory court of three judges under Title 28, U. S. Code, section 2281, to adjudicate this action and for a temporary stay of the trial now pending in the Erie County Court until the final determination of this action.

This is not a proper case for a three-judge court under section 2281. Assuming, for purposes of this decision, that

[1] Defendant Carman F. Ball has conceded that wiretap evidence was obtained under the state statute and that it will be used at the coming state trial. Affidavit of Frederick M. Marshall, March 24, 1961

the relief here sought is within the three-judge statute,[2] the motion must still be denied for lack of a substantial constitutional issue. The Supreme Court held in *Olmstead v. United States*, 277 U. S. 438 (1928), that the obtaining of wiretap evidence by federal officers did not violate the Fourth or Fifth Amendments to the Constitution and in a later case specifically refused to overrule this decision. *Goldman v. United States*, 316 U. S. 129, 135-36 (1942). The conclusion there reached is all the more clear with respect to wiretapping by state officials, whose conduct is measured by the less restrictive provisions of the Fourteenth Amendment.

The remaining contention pressed by plaintiffs is that the statutes are invalid due to the provisions of the Federal Communication Act of 1934, Title 47, U. S. Code, section 605. This is not a constitutional issue, for purposes of the three-judge court statute, and may be decided by a single district judge. *Bell v. Waterfront Commission of New York Harbor*, 279 F. 2d 853 (2d Cir. 1960). However, this court declines to grant the temporary injunction requested by the present motion on the basis of *Pugach v. Dollinger*, 277 F. 2d 739 (2 Cir. 1960), *aff'd* 365 U. S. 458 (1961), which is deemed to be controlling.

Plaintiff's motion is denied in its entirety.

So ordered.

Dated: June 7, 1961.

s/s JOHN O. HENDERSON,
JOHN O. HENDERSON,
United States District Judge.

[2] The state statutory and constitutional provisions here involved deal with the installation and operation of wire taps pursuant to court order, not with

(Footnote continued on following page)

Appendix E

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and *ex parte* orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof." Article I, Section 12, New York State Constitution.

Appendix F

"An *ex parte* order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications,

(Footnote continued from preceding page)
the use of evidence obtained as a result of such wiretaps. However, in view of the decision reached above, it is not necessary to decide, under the circumstances here presented, whether the request for temporary injunction staying the trial joined with the demand for declaratory judgment of unconstitutionality of the state statute is equivalent to an application for an "injunction restraining the enforcement, operation or execution of any State statute", as required by section 2281 before a three-judge court may be convened.

conversations or discussions are to be overheard or recorded and the purpose thereof, and in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved * * *" Section 813-a, New York Code of Criminal Procedure.

Appendix G

(47 U. S. C. 605) "* * * no person not being authorized by the sender shall intercept any communication and divulge the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. * * *"

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IN THE

Supreme Court of the United States

October Term, 1961

No. 576

WILLIAM WILLIAMS, BARTHOLOMEW CANNIZZARO, LOUIS ANGRISANO, PASQUALE NATARELLI, ROBERT RAINEY, SAMUEL FRANGIMORE, NELSON WILLIAMS, PHILIP DiBLASIS, JOE D. BROWN, RALPH DiBLASIS, STEVEN CANNAROZZO, JOSEPH S. OCCHINO, ERNEST MOULSON, VINCENT J. OCCHINO, MONROE VINSON,

Petitioners,

v.

HON. CARMAN F. BALL, District Attorney of Erie County,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1961

No.

WILLIAM WILLIAMS, BARTHOLOMEW CANNIZZARO, LOUIS ANGRISANO, PASQUALE NATARELLI, ROBERT RAINEY, SAMUEL FRANGIMORE, NELSON WILLIAMS, PHILIP DiBLASIS, JOE D. BROWN, RALPH DiBLASIS, STEVEN CANNAROZZO, JOSEPH S. OCCHINO, ERNEST MOULSON, VINCENT J. OCCHINO, MONROE VINSON,
Petitioners,

v.

HON. CARMAN F. BALL, District Attorney of Erie County,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

(Numerals in parentheses are references to pages in the petitioner's printed petition.)

The opinion of the United States Court of Appeals for the 2nd Circuit is reported at 294 F. 2d 94, while the opinions of the District Court are recorded at 194 F. Supp.

393 (on the question of the petitioner's request for an injunction) and at page 29 in the appendix of the petitioner's present petition for certiorari (on the respondent's motion to dismiss this action).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 31, 1961 (23). The petition for a writ of certiorari was filed November 29, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 1 (b) of Rule 19, of the Rules of this Court on the ground that substantial questions involving

1. the constitutional rights of the petitioners, and
2. the decisions of the Courts below,

have not, but should be settled by this Court.

Questions Presented

1. Is wire tapping, particularly the divulgence of the information obtained therefrom by a state officer in a state criminal proceeding, done pursuant to, and in compliance with a state statute and constitution, prohibited by:
   (a) the United States Constitution and/or
   (b) 47 U. S. C. 605 (The Federal Communications Act)?
2. Is the procedure used here by the petitioners, the proper manner in which to raise the substantive issue presented?

Statutes Involved

The Statutes involved are as follows:

1. Article I Section 12 New York State Constitution

   (set forth in the petition for certiorari at page 33)

2. Section 813-a New York Code of Criminal Procedure

   (set forth in the petition for certiorari at page 33)

3. 47 U. S. C. 605

   (pertinent portion set forth in the petition for certiorari at page 34)

4. 28 U. S. C. 1337

   "Section 1337. Commerce and anti-trust regulations

   The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce • • •"

5. 28 U. S. C. 1343 (3)

   "Section 1343. Civil rights and elective franchise

   The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

   • • •

   (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

   • • •"

6. 28 U. S. C. 2281

   "Section 2281. Injunction against enforcement of State statute; three-judge court required

   An interlocutory or permanent injunction restraining the enforcement, operation or execution

of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

7. 42 U. S. C. 1983

"Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

8. Article I, Section 8, United States Constitution (pertinent portion)

"Section 8. • • •

To regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes;

• • •"

9. Amendment X, United States Constitution

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

10. Amendment XIV Section 1, United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

11. Article VI, United States Constitution

"• • •

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

• • •"

Statement of the Case

Each of the petitioners were indicted in April 1960 by an Erie County Grand Jury charging them with the crimes of conspiracy and contriving a lottery in violation of Sections 580 and 1372 of the Penal Law of the State of New York. Each defendant pled not guilty to such charges and while awaiting trial commenced this action for a declaratory judgment and permanent injunction on or about March 14, 1961.

Prior to the commencement of this action several of the defendants made application for an injunction on or about October 25, 1961 to the Honorable John O. Henderson, United States District Judge, Western District of New York, such application being merged by consent into the present proceeding.

While originally the action was directed against other law enforcement officials of the State of New York (*i.e.* Hon. Arthur J. Cornelius, Jr., Superintendent New York State Police; Hon. Louis J. Lefkowitz, Attorney General, State of New York, and the Commissioner of Investigation of the State of New York), by consent an order was entered by the District Court on August 11, 1961, discontinuing the action against all defendants except to present respondent.

The purpose of the action was to restrain the respondent here—the District Attorney of Erie County—from using at the trial of the indictment certain wire tap evidence used in securing such indictment. It stands admitted that such evidence will form an important part of the People's case at trial.

The theory upon which the relief was requested was that the constitutional or at least the statutory rights of the defendants as United States citizens or subjects were or are to be violated and that the declaratory judgment and permanent injunction were the only means by which the defendants could avoid irreparable injury.

The petitioners' request for a temporary injunction and a three-man court to decide the constitutional claim was denied on June 7, 1961, and the respondent's motion to dismiss the action for failing to state a sufficient claim was granted August 22, 1961. Both orders were affirmed on appeal by the United States Circuit Court of Appeals for the 2nd Circuit on August 31, 1961.

ANSWER TO THE APPLICATION MADE

1. On the Substantive Question

Reviewing the contentions made, it can be stated with a considerable degree of certainty that the use of wiretap evidence involved here is constitutionally permissible. *Olmstead v. United States*, 277 U. S. 438 (1928), *Goldman v. United States*, 316 U. S. 129, 135-136 (1942) but see *Silverman v. United States*, 365 U. S. 505 (1961). These cases hold that such conduct does not violate the 4th and 5th Amendments of the United States Constitution, and this writer knows of no authority holding that the 14th Amendment of such Constitution confers broader or greater rights than those particularized in the first ten amendments, though it is appreciated that this Court constantly re-examines its decisions and varies the scope and sweep of the Constitutional provisions as it sees fit in view of changing conditions. See *Mapp v. Ohio*, 367 U. S. 643 (1961).

Thus up to now, the restrictions on the use of wire tap have come from either state constitutional or statutory prohibitions or Federal legislation, *Nardone v. United States*, 302 U. S. 379 (1937), here in particular, 47 U. S. C. 605, Section 813-a New York Code of Criminal Procedure and Article I, Section 12 New York State Constitution.

It stands conceded that the wiretaps here were made in compliance with the New York State constitutional and statutory provisions so that the only question remaining is the effect, if any, of 47 U. S. C. 605. While it is true that such section was given sweeping effect, *Nardone v. United States, supra*, *Weiss v. United States*, 308 U. S. 321, to the point that all use of wiretap, regardless how made, by federal officers, was prohibited, not until *Benan-*

ti v. United States, 355 U. S. 96 (1957) was it ever unequivocally stated by this Court, even though *in dictum*, that such use by a state official, though sanctioned by state law, was a federal violation. To the contrary this Court implied otherwise.

> "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."
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> *Schwartz v. Texas*, 344 U. S. 199, at pages 302, 303.

As a result the New York Court of Appeals has continually reaffirmed its decision in *People v. Stemmer*, 298 N. Y. 728 (1948), affirmed—equally divided court 336 U. S. 963, petition for rehearing denied 337 U. S. 921, to the effect that a wiretap conducted in accordance with New York Law is not a violation of 47 U. S. C. 605.

People v. Saperstein, 2 N. Y. 2d 210, cert. denied 353 U. S. 946 (1957);

People v. Graziano, 4 N. Y. 2d 881, cert. denied 358 U. S. 851 (1958);

People v. Broady, 5 N. Y. 2nd 500, 6 N. Y. 2nd 814, cert. denied and appeal dismissed *per curiam* 361 U. S. 8 (1959);

People v. Dinan, 6 N. Y. 2nd 715, cert. denied 361 U. S. 839 (1959).

Faced with this conflict, and were it not for the procedural problem involved, the Respondent as a responsible

law officer, would be happy to join in the application made if it would result in a definitive ruling by this Court of the substantive issues thus presented.

While it is true that this Court gave at least tacit approval of the Circuit Court's determination permitting use here, in its decision in *Pugach v. Dollinger*, 365 U. S. 458, affirming 277 F. 2nd 739 (2 Cir. 1960), the short terse comment accompanying such decision has left state law enforcement officers in the harrowing position of having authority to substantiate the use of wire tap evidence in State trials, *Schwartz v. Texas*, 344 U. S. 199 (1952) but subjecting themselves to possible Federal prosecution if they do so. *Benanti v. United States*, 355 U. S. 96 (1957), *Pugach v. Dollinger*, *supra*, concurring opinion of Waterman, J., Circuit Judge, at page 746. Faced with the sworn duty of using every bit of evidence legally permissible in securing the proper obedience to the law, the dilemma imposed upon them is grossly unfair, and in contradiction to the efforts now being made to secure just enforcement of the law. Is it less of a wrong to leave a law enforcement officer at sea than it is a defendant? No, a proper concept of justice eliminates traps and pitfalls not only for the defense but also for the prosecution in its search for the truth.

It may well be that this is an area for legislative concern (this perhaps being a reason for the terse opinion in *Pugach v. Dollinger*) but sometimes however Congress needs prodding. Contrary to some belief, its lack of specific action can also be interpreted as a feeling that the courts will solve the problem through "interpretation".

Concluding then, we see an area where the guiding hand of this Court would be helpful; it being for this Court to decide whether now would be a propitious time to act.

2. On the Procedural Question

The procedural considerations which led the lower courts in this instance to deny the petitioners' application have been fully developed in the respective opinions rendered and need not be restated here. It is these same considerations which prompted this Court to affirm the same Circuit Court's decision in *Pugach v. Dollinger*, *supra*, a situation identically similar, not only on the authority of *Schwartz v. Texas*, but also on the authority of *Stefanelli v. Minard*, 342 U. S. 117.

The Petitioners' other contentions that they could not raise the substantive question on appeal upon conviction does not appear sound in view of the latitude of 28 U. S. C. 1254 (3) and the just willingness of this Court to review substantial federal questions. See *People v. Stemmer*, *supra*.

CONCLUSION

For the foregoing reasons, while a substantial federal question has appeared, it is respectfully submitted that the procedural considerations compel a denial of the petition for a writ of certiorari.

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Respectfully submitted,

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